

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

EXPRESS SCRIPTS, INC., et al.,

Plaintiffs,

v.

THE FEDERAL TRADE COMMISSION, et
al.,

Defendants.

Case No. 4:24-cv-1549-MTS

NOTICE OF CHANGE IN POSITION

Defendants respectfully submit this Notice to inform the Court that the Acting Solicitor General has decided that the multiple layers of removal restrictions for administrative law judges in 5 U.S.C. § 7521 do not comport with the separation of powers and Article II and that the Department of Justice will no longer defend them in litigation. Accordingly, the Department of Justice will not continue to defend Section 7521 in this action. *See* Defs.’ Mem. in Opp. to Pls.’ Mot. for Prelim. Inj. (“Defs.’ Mem.”) at 14-18, ECF No. 44. Defendants also inform the Court that the Acting Solicitor General has decided that the for-cause removal protections for the Commissioners of the Federal Trade Commission in 15 U.S.C. § 41 likewise do not comport with the separation of powers and Article II and that the Department of Justice will no longer defend them in litigation. Accordingly, the Department of Justice will not continue to defend those protections in this action. *See* Defs.’ Mem. at 12-14.

Defendants nonetheless maintain that this Court should deny Plaintiffs’ motion for a preliminary injunction. Defendants continue to argue that Plaintiffs’ removal claims fail at the threshold because Plaintiffs must show “not only that the removal restriction transgresses the Constitution’s separation of powers but also that the unconstitutional provision caused (or would

cause) them harm.” *Id.* at 12 (quoting *Bhatti v. FHFA*, 97 F.4th 556, 559 (8th Cir. 2024)). Plaintiffs cannot do so here. *Id.* at 11-12. Defendants also continue to argue that, even if Plaintiffs were to prevail on their removal claims, the proper remedy would be severance of the offending removal provisions, not injunctive relief enjoining an ongoing administrative proceeding. Accordingly, this Court should not issue preliminary injunctive relief that would not be obtainable upon final resolution of the merits. *Id.* at 18-19.

Additionally, as Defendants explained at oral argument, this Court should deny Plaintiffs’ motion without reaching the merits of any of Plaintiffs’ claims because they have failed to satisfy the irreparable harm requirement for preliminary injunctive relief. *See id.* at 23-25; *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1333-34 (D.C. Cir. 2024).

Dated: February 15, 2025

Respectfully submitted,

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